

To the Right Honourable, the Lords of
Council and Session.

The PETITION of Hugh Wallace of Inglistoun.

Sheweth,

That where in anno 1683, Sir Andrew Forrester having procured for the behove of *John Cranwel* his Servant, a Gift under the Kings Hand, of the Escheat of Collonel *James Wallace*, fallen through his Forefaultry, which was taken in the name of *Umquhile Gilbert Nicolson* Writer in *Edinburgh*, and expedie and managed by him without your Petitioners knowledge, until it came the length of a Decreet against Mr. *John Wallace* his Son, decerning him in considerable Sums as Intrometted by him of his Fathers Money. The said Mr. *John Wallace* did then apply to your Petitioner as his Friend, and being of his name, to procure him a favourable Composition from the Donator, which was the first knowledge that ever your Petitioner had of the Affair: and being willing to do him kindness, he did so far prevail with Sir Andrew Forrester and his Servant, as to get their Warrant to Commune in the Matter; and in place of five or six hundred Pound Sterling, which was decerned against Mr. *John*, your Petitioner did prevail with them to accept of 100 lib. Sterling payable at London, free of Exchange and any Expense upon the Gift and Diligence following thereupon. And Mr. *John* did further prevail with your Petitioner, to lend him the Money to pay the said Composition, and other Expenses of the Gift upon his Bond, with three Cautioners, which was thereafter repayed to your Petitioner, and the Bonds retired; and Mr. *John* received an Assignation to the Gift of Escheat from the Donator.

This being the true Matter of Fact, whereupon your Petitioner always was, and is ready to Depone; yet your Petitioner met with such injustice and Ingratitude from Mr. *John Wallace*, that he conveyed your Petitioner before the Committee of Fynes and Forefaultries in anno 1690, for Repetition of the Sum contained in the said retired Bond; alledging that it was granted for the Composition of his Fathers Forefaultry, and that the Gift was for your Petitioners behove: But after calling thereof in November 1690, your Petitioner having got him to meet before some of his Friends, he was ashamed of the Process and deserted the same, and never Insisted though he lived several years thereafter.

After Mr. *Johns* death, *Fean Hutcheson* his Relict and Executrix dative, did intent the said Process of new, before your Lordships; at the calling whereof before my Lord *Whitelaw*, his Lordship in anno 1685, did give his Interlocutor in these words, viz. Finds it relevant to be proven by the said Hugh Wallace of Inglistoun his Oath, that the foresaid Bond lybelled on and produced, was granted in Composition. or for Composition, or upon account of Composition, for the said *Umquhile Collonel James Wallace* his Escheat upon Forefaultry. Conform to which Interlocutor, your Petitioner was ready to Depone, but could not procure an Extract of the Act, the Pursuers Agent having

having taken up the Process from the Clerk which he carried to the Country, and kept it up for six Months; till upon new Application by the Pursuer, and a new Hearing, the foresaid Interlocutor was altered, and an ~~Act~~ made before Answer, appointing the Cautioners granters of the Bond, and the Writer and Witnesses insert, to be Examined as to the Cause of the granting thereof: And accordingly they being Examined, it appeared clearly to your Lordships, the time of the Advising thereof, that the Gift was to the behoove of *Cranwel*, but your Petitioner was Burdened to prove, that the Composition was payed to *Cranwel* before the year 1690. And the first of *June* last, was assigned for that effect, albeit at that time your Petitioner knew not whether *Cranwel* was dead or alive; nor was he concerned with him, having only lent the Money to Mr. *John Wallace* to pay the Composition as said is; nor was your Petitioner allowed an Incident, for recovering of any Receipt or other Writ, that might prove the same from the Representatives of *Gilbert Nicolson* the Donator, or of Mr. *John Wallace* himself, who were the only persons that could be supposed to have such a Receipt if any such was. And your Petitioner humbly conceives, that the Donator his granting of an Assignment of the Gift in favours of Mr. *John Wallace*, was sufficient to prove that the Composition was payed; and which Assignment being in the Pursuers, or her Sons own Custody, it will appear thereby, that the same was granted at the time of granting the Bond.

Before the first of *June*, and your Petitioners getting of *Cranwels* Receipt of the Money, your Petitioner and *George Wallace* only Son and Child of Mr. *John*, did submit this Matter and Process to Sir *William Wallace* of *Craig*: and the Pursuer having offered to Circumduce the Term for not proving, *ut supra*; your Petitioners Procurators did propone upon the Submission; and it being alledged for the Pursuer, that she was not the Submitter but her Son. To which it was Replied, that she only having the naked Office of Executry, and the Son being the only Child and nearest of Kine, it was for his behoove; which my Procurators upon mistake, and upon the evident presumption in Law, proponed *peremptoria causa*: And the same is found relevant to be proven by her Oath, *cum onere expensarum*, and not *peremptoria causa*: neither is it so much as affirmed by the Pursuers Procurators in her Petition after exprest, that it was *peremptoria causa*, which occasioned your Petitioners Procurators to suffer her to Depone.

Thereafter, there was ane Bill given in to your Lordships, by the said *Fean Hutcheson* Pursuer, Reclaiming against the said Interlocutor, and upon the Matter, acknowledging, that the Pursuit was not to her own behoove, but to her Sons, and the Creditors which is all one. And 2. Alledging, that the Submission was past from, by a Letter under the Arbiters hand, and therefore craving, that the Circumduction might go out, and that she might be Liberat from Deponing: Which Bill was upon the 26 of *June* last, refused, without any Answers made thereto, for your Petitioner, and your Lordships may be pleased to remember, that at that time, all, or most of your Lordships Number was of Opinion, that she could not Depone, and that she only having the naked Office of Executrie, the Action behoved to be for her Sons behoove.

The said *Fean Hutcheson* Pursuer, did notwithstanding, Compear and Depone *negative*, and your Petitioners Procurators having given in Interrogators, by which her Depositions, and the behooves might have been clear, Yet she was not Examined upon these Interrogators, and her Oath having been summarly Advised upon *Saturday* last, your Lordships have not only pronounced Decreet against me, for payment of the whole Sums, both principall and Annualrents, contained in the said retired Bond, but have also remitted to the Ordinar, to modifie Expences,

against

(3)

Against which, your Petitioner begs liberty to Reclaim upon these following Grounds, which are humbly offered to your Lordships consideration, viz. 1. That it was sufficient for me to allege, That the Pursuit was to *George Wallace* the Submitters behoove, the Defence being both relevant *per se* and emergant, since the Act of *litis contestation*. And albeit my Advocats, either out of the confidence they had, that it was impossible, that she could Depone otherwayes, it being plain and clear as the Sun, that the Title she pursues upon, gives her only the naked Office, and that her Son, as only nearest of Kine, has the Right; or being peremptorily pressed by the Lord Ordinary, for eviting of Delays, to propone the said dilator *peremptorie*, yet the same is only sustained by the Interloquitor to be proven by her Oath *cum onere expensarum*, and not *peremptorie*.

2. There being no Act extracted upon that Debate, the same remains only in the terms of an Interloquitor, and its humbly expected, from your Lordships Justice, that you will Re-consider the same, and without further examining, whither the matter be for the Mother or the Son's behoove, That your Lordships would be pleased to receive the Probation which I presently produced under *John Cranwalls* hand, for proving, that he received the said Composition, in the year 1684. in the Terms of the Act of *litis contestation*.

3. It never has been your Lordships custome to cut Parties short, or take advantage of mistakes, or little points of form, where the material Point is instantly proven, as in this case, and which your Lordships have lately practised in the like case, by reponing a Party to his Defence of payment instantly verified, albeit an exception of Improbation (which by common form, is *omnium ultima*) had been proponed, and an Act extracted; Whereas your Lordships Petitioners his case is much more favourable, both in point of form, Material Justice and Equiry.

4. Your Lordships are intreated to consider the foresaid Bill, given in by the Pursuer, and subscribed by her Advocat, wherein she acknowledges, that the said Action was for the behoove of her Son, or the Creditors, which put the matter in controversie beyond all doubt, and being conjoynd with her Title, which is only the naked office of Executrix, her mistake has been, that she being Creditrix to her Husband, that did make the Action for her behoove, and your Petitioner humbly conceives, that he must have as much advantage by the foresaid Bill signed under her Advocats hand, as the Pursuer can pretend to, by your Petitioners Advocats proponing the foresaid Defence *peremptorie*, which being but a quirk, and not mentioned by the Lord Ordinary, in his Interloquitor, It is hoped, your Lordships will have no regard thereto, but repone your Petitioner to prove *instante*, what he is obliged to prove, by the Act of *Litis contestation*.

5. If the Pursuer had been interrogat, upon the Interloquitor ^{orators} given in by your Petitioner, it had cleared her, and your Lordships fully in the matter, which it's humbly expected, your Lordships will yet allow.

And as to that part of the Interloquitor, remitting to the Ordinar, to modify Expenses, there could be no Expenses due in Law, she only pursuing as Executrix, albeit there were a Debt, yet before the same be established by a Sentence, the Executrix can claime no Expenses.

May it therefore please your Lordships, to take the Premisses and the whole Tract and Merits of this Cause to your serious Consideration; and either to ordain the said *Jean Hutchison* the Pursuer, to be Re-examined upon the Interrogators given in, whereby she may clear her self and your Lordships what way this Pursuit is to her behoove, since the contrary has been acknowledged under her Advocats hand, which ought to be of as great

(4)

great advantage to your Petitioner, as his Advocats proponing *peremptoria*, can or ought to be to the Pursuer; or otherways, to evite all farther Debate as to that Point, to allow your Petitioners probation that the Money was payed to *Cranwel* in the Terms of the Act of *litis contestation* to be received, and to Discharge any Modification of Expenses according to Justice, and your Lordships answer.

Follows Jean Hutchisons Bill.

MY Lords of Council and Session, unto your Lordships, Humbly mean and shows, your Servitrix Jean Hutchison, that having pursued Hugh Wallace of Inglishton, for Repetition of the Composition payed by my Husband to him, or others for his behove, for the Escheat upon Forefaulure of Collonel Wallace his Father; your Lordships found my Lybel proven, but sustained this Defence proponed for Inglishton v.z. that he had payed the said Composition to John Cranwel prior to the Act of Parliament, Rescinding Fynes and Forefaulures, relevant to be proved in scripto, and Assigned the first of June for proving thereof.

After elapsing of which Term, upon the 5th of June instant, I craved the Term to be Circumduced, at which time it was alledged, that the Parties were under Submission; and for proving thereof, produced a Submission subscribed George Wallace of Montcastle my Son, and Inglishton: to which I having replied that I was Pursuer and not he and that I had not subscribed, the Lord Whitelaw Ordinar, repelled the Defence and Circumduced: Thereafter a new Calling is procured from his Lordship upon the 12th of June, and the same Allegiance resumed, and further offered to prove by my Oath, that the same was for the behove of my Son who submits, and assigned the first of July for my Deposing thereupon.

As to which, I beg liberty to represent, that I am Executrix confirmed to my Husband, and have found Caution to hold Compt to his Creditors, and nearest Kine, and my Oath can constitute no Debt, nor sustain any Submission in prejudice of them, and my Son being Heir to his Father, the Process is certainly so far to his behoove, that he has relief from the Executrix of moveable Debts, but no interest in the Executrie, being only an Office, it is not in my Power any manner of way, to make what falls under Executrie, for the behoove of one or others in the prejudice of the Creditors, and nearest of Kine of my Husbands, to whom I am Executrix, so for me to Depone upon his Allegiance, is in vain, because to acknowledge it by me, is of no import.

2. As to the Allegiance is not relevant, tho proven, so Inglishton having induced my Son to submit to the Laird of Craige, with an blank time for determination thereof, the time agreed, was the first of June, now past, as appears by Craiges Letter produced, who thereby signifies he will not meddle any further in the affair.

May it therefore please your Lordships to Ordain my Circumduction already pronounced, to be Extracted, or recommend to the Lord White Law, upon the Grounds represented so to do, according to Justice, and your Lordships Answer.

June 26. 1697.

THe Lords having considered this Bill, they refuse the desire thereof, and adhere to the former Interlocutor, and Ordain the Petitioner to Depose.

Sic Subscibitur Will: Hamilton. I. P. D.